PARAMOUNT CORPORATION BHD

v.

MULPHA PACIFIC SDN BHD

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[ORIGINATING SUMMONS NO: MT3-24-792-97]
22 MAY 1998

CONTRACT: *Interest - Agreement for sale and purchase of shares - Payment of accrued interest for extension of time - Whether defendant liable - Whether defendant agreed to pay accrued interest - Whether part of balance sum - Forfeiture of deposit - Whether compensation for non-payment of accrued interest*

WORDS AND PHRASES: *"… subject to payment of the Agreed Interest" - Sale and purchase of shares, agreement*

WORDS AND PHRASES: *"… all accrued Agreed Interest shall be paid together with the Balance Sum" - Sale and purchase of shares, agreement*

The plaintiff and defendant executed an agreement for the sale and purchase of shares ('S&P Agreement') wherein the defendant paid a deposit of RM9 million to the plaintiff. By virtue of cl. 4.2 of the S&P Agreement, the defendant availed itself of the right to an extension of time to make payment for the balance sum. At the end of the extension period, the defendant did not pay the balance sum and notified the defendant accordingly. The plaintiff then forfeited the deposit and in this instance, claimed interest ('accrued Agreed Interest') for the duration of the extension of time that was granted.

Held:

[1] "… subject to payment of the Agreed Interest" in cl. 4.2 of the S&P Agreement meant that the payment of interest prevailed so that additional time was only granted because the defendant had agreed at all times to pay interest for the additional time. Hence, the payment of interest was a condition precedent to the granting of additional time by the plaintiff to the defendant.

[2] The words "together with" in cl. 4.2 wherein it was stated that "… all accrued Agreed Interest shall be paid together with the Balance Sum", were ordinary words not defined in the S&P Agreement and were

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therefore to be construed by reference to their popular meaning as found in the dictionaries. As such, the expression "together with" meant that the accrued Agreed Interest was to be paid at the same time fixed by cl. 4.2 for the payment of the balance sum.

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[3] The accrued Agreed Interest was a separate debt due from the defendant to the plaintiff and must not be confused or "merged" with the balance sum. The balance sum was consideration for the purchase of the shares and the accrued Agreed Interest was consideration for the plaintiff being put out of use of money already due to the plaintiff and created a separate debt payable by the defendant. But had the defendant not agreed

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to make payment of the accrued Agreed Interest, the plaintiff would have terminated the S&P Agreement at an earlier date.

[4] The obligations to pay the balance sum and the accrued Agreed Interest were not created at the same time. The fact that the defendant had

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refused to make payment of the balance sum did not prejudice the fact that the defendant was still liable for the accrued Agreed Interest.

[5] In ascertaining the meaning of the words used in the S&P Agreement, the court could not introduce additional words and expressions into cl. 13.1 and should confine itself to the words used therein.

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[5a] Upon a proper construction of cl. 13.1, the forfeiture of the deposit did not constitute compensation for the defendant's breach of the S&P Agreement. It followed, therefore, that the forfeiture certainly could not be construed as compensation for the defendant's failure to make

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payment of the accrued Agreed Interest.

[6] The expression "Final Balance" was specifically defined by the S&P Agreement and clearly did not include the accrued Agreed Interest.

[7] On the facts, the defendant had committed a breach of the S&P Agreement and so should not be permitted to take advantage of its own

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breach and default.

[8] In fact and in law, the accrued Agreed Interest is not a penalty but is actually consideration for the plaintiff having so granted the additional time to the defendant.

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Obiter:

[1] When an agreement has been reduced into writing, the parties are bound by the terms and conditions of the written document. They are bound by

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the four corners of the written document. The words and expressions used in a written document such as the S&P Agreement should be given their literal and natural interpretation.

[Order for the plaintiff.]

Cases referred to:
Kok Kon Sang v. Siti Zaliha Bte Md Noor & Anor [1993] 1 CLJ 53 ***(refd)***
Lam Soon (M) Bhd v. Mazharta Sdn Bhd [1997] 2 AMR 1620 ***(refd)***
Roberts v. Bury Commissioners [1870] LR 5 CP 310 ***(refd)***
Royal Selangor Golf Club v. Anglo-Oriental (Malaysia) Sdn Bhd [1990] 1 CLJ 995 ***(refd)***

Other source referred to:
Chitty on Contracts, vol 1, 27 edn, para 12-070

For the plaintiff - SK Yeoh (Libby IS Ong with him); M/s SK Yeoh & Jeganathan
For the defendant - SK Lee (KY Sim with him); M/s Michael Chen & Lee

Reported by Usha Thiagarajah

JUDGMENT

Low Hop Bing J:

Plaintiff's Claim

The plaintiff's claim raises an important point of law governing the liability, or otherwise, of the payment of interest for agreed extension of time pursuant to an agreement for the sale and purchase of properties such as shares, land, chattels etc. The plaintiff claims that, pursuant to a sale agreement, the plaintiff is entitled to interest as follows:

l.	Interest for the First Period	RM710,136.99
2.	Interest for the Second Period	RM 66,575.34
	Total	RM776,712.33

Agreed Facts

The parties herein have agreed to the following facts:

1. The plaintiff and the defendant excuted a sale and purchase agreement dated 17 April l997 ("sale agreement") for the sale and purchase of shares in Wangsa Merdu Sdn. Bhd. (Unless the context otherwise requires, a reference to a clause in this judgment is a reference to that clause in the sale agreement).

2. A sum of RM9 million ("deposit") was paid by the defendant to the plaintiff upon execution of the sale agreement.

3. The defendant was entitled to request for a one-month extension ("l-month extension") subject to payment of interest at the rate of l0% p.a. calculated on a daily basis on the balance sum outstanding i.e. RM81 million.

4. By a notice dated 13 October 1997, the defendant notified the plaintiff that the defendant would avail itself of the right to an extension of l month from the completion date and therefore the balance sum was to be paid on or before 17 November l997.

5. The defendant requested for a further extension ("3-day extension") until 20 November 1997 for the payment of the balance sum.

6. By a letter dated 20 November 1997, the defendant gave the plaintiff notice that the defendant would not be completing the sale and purchase in accordance with the sale agreement.

7. By a letter dated 21 November 1997, the plaintiff did the following simultaneously:

   (1) terminated the sale agreement pursuant to cl. 13.1;

   (2) immediately forfeited absolutely the deposit; and

   (3) made demand against the defendant for the immediate remittance of the sum of RM776,712.33 being the agreed interest accrued on RM81 million for 35 days from 17 October 1997 to 20 November 1997 (inclusive), failing which interest shall continue to accrue on the sum of RM776,712.33.

8. By a letter dated 28 November 1997, the defendant contended that interest in the amount as claimed by the plaintiff is not due to the plaintiff on the termination of the sale agreement pursuant to cl. 13.l, wherein the parties have specifically agreed that the remedy to the plaintiff is to forfeit the deposit. The defendant therefore denies the plaintiff's claim.

Issue For Determination

The sole issue for determination by the court is whether the defendant is liable to the plaintiff in the sum of the accrued agreed interest for the additional time granted to the defendant (namely, the first and second periods).

Submissions Of The Parties

It was contended for the plaintiff that upon a proper and true construction of cl. 4.2, the plaintiff is entitled to, and the defendant is liable to pay to the plaintiff, the aforesaid total sum of RM776,712.33 as claimed.

The essence of the submission for the defendant may be summarised as follows:

1. The deposit of RM9 million is also consideration for the "additional time".
2. The defendant is excused from making payment of agreed interest for "additional time" utilised by the defendant because the defendant had decided to deliberately default the sale agreement by refusing to pay the balance sum.
3. The "agreed interest" is be considered in similar breath with the "balance sum", which are not separate debts or obligations.
4. If the defendant fails or decides to breach or refuse to pay the "balance sum", then the defendant is also not obliged to pay the "agreed interest".
5. In the alternative, the charging of interest is a penalty and "loss" has to be proved before the plaintiff is entitled to the same.
6. Further in the alternative, in any event, based on cl. l3.l upon the forfeiture of the deposit, the plaintiff is not entitled to any other remedy or to recover any other losses.

Decision Of The Court

Construction Of The Sale Agreement

The determination of the aforesaid issue necessitates the construction of the sale agreement. The basic principles of law that apply to the construction and interpretation of an agreement are as follows:

Effect of written agreement (within four corners of agreement)

Where an agreement has been reduced into writing, then the general principle is that the parties are bound by the terms and conditions of the written document. The parties are bound by the four corners of the written document: *Royal Selangor Golf Club v. Anglo-Oriental (Malaya) Sdn Bhd* [1990] 1 CLJ 995 @ pp. 997 & 998.

Rules of interpretation (literal rule)

Words and expressions used in a written document such as the sale agreement should be given their literal and natural interpretation: *Kok Kon Sang v. Siti Zaliha bte Md Noor & Anor* [1993] 1 CLJ 53 @ p. 59

Interpretation Of Cl. 4.2

Clause 4.2 reads as follows:

> *PROVIDED ALWAYS and it is hereby agreed between the parties hereto that the Purchaser shall be entitled to an extension of one (1) month, commencing on the day immediately after the Completion Date (hereinafter referred to as "the Extended Completion Date") subject to payment of the Agreed Interest calculated on a daily basis on the Balance Sum outstanding Provided that all accrued Agreed Interest shall be paid together with the Balance Sum."* (emphasis added)

To put it simply, cl. 4.2 permits the defendant (as purchaser) to buy additional time to fulfil an obligation that has already fallen due and the defendant has agreed contractually to make payment for that additional time.

The critical elements of cl. 4.2 which are called into question and to be construed are as follows:

(a) " … subject to payment of the agreed interest"

The key expression here relates to the words "subject to". Used in this context, in my view, this expression means that the payment of interest prevails so that additional time is only granted because the defendant had agreed at all times to pay interest for the additional time. This meaning makes the expression "subject to" literal and clear on the face of the clause; and is in accordance with business efficacy and in complete harmony with the nature of the agreement itself.

Therefore this part of cl 4.2 provides that in consideration of the plaintiff agreeing to grant additional time to the defendant, the defendant agreed to pay daily sums calculated on the agreed interest rate to the plaintiff for each day granted. Hence, the payment of interest prevails and is indeed a condition precedent to the granting of additional time by the plaintiff to the defendant. This obligation to pay interest is obviously in addition to the defendant's obligation to pay the balance sum.

(b) "… all accrued agreed interest shall be paid together with the balance sum"

The next key expression relates to the words "together with". These are ordinary words which are not defined in the sale agreement and are therefore to be construed by reference to their popular meaning as found in the dictionaries.

> The Concise Oxford dictionary defines the word "together" as "… simultaneously; at the same time."
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> The Concise Oxford dictionary defines the expression "together with" as "… as well as; also"
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> The Chambers 20th Century dictionary defines the word "together" as: "… at the same time"

In my judgment, the expression "together with" means that the accrued agreed interest is to be paid at the same time fixed by cl. 4.2 for the payment of the balance sum, which in this case was originally 17 October 1997, then extended by one month to 17 November 1997, and finally to 20 November 1997.

This part of cl. 4.2 provides the time when the accrued agreed interest is to be paid by the defendant to the plaintiff. This construction is, in my view, completely consonant with logic, business efficacy and the nature of the sale agreement itself. Clause 4.2 presupposes that the balance sum would be duly paid at the appointed time in accordance with the sale agreement.

Clause 4.2 allows the defendant to buy additional time, without which the defendant would already be in default and the deposit would consequently be forfeited. If the defendant wishes to have additional time to make payment of the balance sum, then the defendant must provide additional consideration for the period of additional time that the plaintiff is put out of use of the balance sum. This additional consideration is to take the form of accrued agreed interest and is distinct and separate from the consideration for the purchase of the shares.

Different Debts And Obligations

The accrued agreed interest is a separate debt due from the defendant to the plaintiff and must not be confused or "merged" with the balance sum. In fact, the parties have taken particular pains to define the meaning of "agreed interest" and the "balance sum" distinctly and separately.

a The balance sum and the accrued agreed interest are considerations for separate and distinct elements. The balance sum is consideration for the purchase of the shares. The accrued interest is consideration for the plaintiff being "put out of use" of money already due to the plaintiff and creates a separate debt payable by the defendant. But for the defendant agreeing to make payment b of the accrued agreed interest, the plaintiff would have terminated the sale agreement at an earlier date.

The obligations to pay the balance sum and the accrued agreed interest are not created at the same time. The fact that the defendant has refused to make payment of the balance sum in breach of the sale agreement, does not c prejudice the fact that the defendant is still liable for the accrued agreed interest.

Nature Of The Sale Agreement And Intention Of The Parties

d The above interpretation of cl. 4.2 is at all times consistent with the nature of the sale agreement and the intention of the parties.

Nature of agreement and of the parties

The agreement is a contract with a sale and purchase price of RM90 million and is a commercial transaction between parties which are e corporate entities actively involved in various forms of business enterprises.

Intention of the parties

f Given the abovementioned facts, the intention of the parties at the time of making the contract may be stated as follows:

(a) Agreement to grant additional time subject to agreement to pay agreed interest.

g (b) Agreement that agreed interest has to be paid even if the defendant breaches sale agreement.

(c) There is no waiver by the plaintiff of the accrued agreed interest.

Legal Implications Of Clause 13.1

h Clause l3.1 reads as follows:

> Subject to the fulfilment of the Conditions Precedent, if the Purchaser shall fail neglect and/or refuse to pay the Final Balance and the Inter-Company Loan at the time set out in Clauses 4.1 or 4.2 hereof or in the manner set out in Clause 6 hereof, the Vendor shall be at liberty to terminate this Agreement i

> by notice to the Purchaser whereupon the Deposit shall be forfeited to the Vendor absolutely and thereafter this Agreement shall terminate and be rendered null and void.

In my judgment, upon a proper construction of cl. 13.l, the forfeiture of the deposit, exercised by the plaintiff upon the breach of the defendant of the sale agreement ie, the non-completion thereof, does not constitute compensation necessitated by the defendant's breach and the forfeiture certainly cannot be construed as compensation for the defendant's failure to make payment of the accrued agreed interest.

The expression "final balance" is specifically defined by the sale agreement and clearly does not include the accrued agreed interest.

In ascertaining the meaning of the words used in the sale agreement, the court cannot introduce additional words and expressions into cl. 13.l and indeed should confine itself to the words used therein. The court should not ignore the words actually used by the parties.

A Party Cannot Take Advantage Of Its Own Breach

The facts of the case demonstrate that the defendant has committed a breach of the sale agreement and so should not be permitted to take advantage of its own breach and default: *Chitty on Contracts*, Vol. 1 (27th Edn) @ para. 12-070, *Roberts v. Bury Commissioners* [1870] LR 5 CP 310 @ p. 331.

In fact and in law, the accrued agreed interest is not a penalty but is actually consideration for the plaintiff having so granted the additional time to the defendant: *Lam Soon (M) Bhd v. Mazharta Sdn Bhd* [1997] 2 AMR 1620 @ p. 1636.

Conclusion

In conclusion, I hold that the defendant is liable to plaintiff in the sum of RM776,712.33.

In the circumstances, I make the following declarations:

(1) That pursuant to the sale agreement dated 17 April 1997 between the plaintiff and the defendant, the defendant is liable and responsible to pay interest at the rate of 10% per annum calculated on a daily basis on the balance sum of RM81 million from 17 October 1997 to 17 November 1997 (inclusive).

(2) That pursuant to the subsequent agreement on or about 15 November 1997 for the second period, the defendant is liable and responsible to pay interest at the balance sum of RM81 million from 18 November l997 to 20 November l997 (inclusive).

Pursuant to the above mentioned declarations, I make the following orders:

(1) That the defendant do make payment of the sum of RM710,136.99 being interest at the rate of 10% per annum calculated on a daily basis on the balance sum of RM81 million from 17 October 1997 to 17 November 1997 (inclusive).

(2) That the defendant do make payment of the sum of RM66,575.34 being interest at the rate of 10% per annum calculated on a daily basis on the balance sum of RM81 million from 18 November 1997 to 20 November 1997 (inclusive).

(3) That the defendant do pay interest at the rate of 8% per annum on the sum of RM710,136.99 from 21 November 1997 until the date of full payment by the defendant of the said sum of RM710,136.99 to the plaintiff.

(4) That the defendant do pay interest at the rate of 8% per annum on the sum of RM66,575.34 from 21 November 1997 until the date of full payment by the defendant of the said sum of RM66,575.34 to the plaintiff.

(5) That the defendant do pay costs to the plaintiff.